defendant. If the state of affairs is such as to be a danger to persons using the highway ... it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse." (See *Morton* v. *Wheeler, supra*). Therefore "if deliberately created and clearly giving rise to danger to road users, fault is implicit and liability incontestable" (per Edmund Davies L.J. in *Dymond* v. *Pearce*, (*supra*, at [1972] All E.R. page 1150).

The answer to the question is that the highway is normally used for passage and repassage (see *Harrison* v. *Rutland (Duke of)*),[32] and if the defendant left a nuisance so close to a highway and it was extremely likely to cause injury to persons using it, it was the nuisance which was the cause of the injury to the plaintiff, and the defendant cannot resile from the conclusion by relying on the act of the plaintiff in trying to avoid the boy because that act could have been prevented if he had kept a proper look-out, or if he had applied his brakes in time, or if he had travelled less slowly than he did (see *Govinda Raju* v. *Laws, supra*). I think cases like *Barnes* v. *Ward*,[33] and *Ann Hardcastle* v. *The South Yorkshire Railway and River Dun Company*[34] carry the present case. The principle of both the cases is that where a source of danger is made substantially adjoining a public highway, an action lies against the maker by a person who has strayed off the highway and fallen into it, or who has made a false step or became giddy and left it and sustained injury.

It was further argued that since quantum was agreed upon at date of trial interest on damages should be awarded from date of judgment and not, as the learned judge held, from date of service of writ. Counsel did not elaborate on it, and the matter was left there without it being fully argued before us.

The power of the court to award interest on damages is contained in section 11 of the Civil Law Act, 67 of 1956 (see also O.40, r.11 of the Supreme Court Rules). This section gives the court power, if it thinks fit, to order that there shall be included in the sum in which judgment is given interest at such rate as it thinks fit on the whole or any part of the damages for the *whole or any part of the period* (emphasis mine) between the date when the cause of action arose and the date of judgment. Therefore, in proceedings for the recovery of damages, the court generally exercises its power so as to include in that sum interest on those damages or on such part of them as it considers appropriate, unless it is satisfied that there are special reasons why no interest should be given. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself, so he ought to compensate the plaintiff accordingly. Section 11 of the Civil Law Act is, I think, modelled on the provisions of section 3(1) of the (U.K.) Law Reform (Miscellaneous Provisions) Act, 1934, and those provisions have been judicially considered in a number of cases, where the courts have laid down certain guide lines (see, for example, *Jefford* v. *Gee*).[35]

In proceedings for the recovery of damages for personal injuries, the court awards one lump sum, and it is under no duty to divide up the award between component elements, the sum assessed being one overall payment adjudged to be a fair compensation. Interest should therefore be awarded on this lump sum as from the date when the defendant ought to have paid it, but did not, for it is from that date that a plaintiff can be said to have been kept out of his money. This date is normally "from the time of action brought at all events": per Lord Herschell L.C. in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[36] which was applied in *Jefford* v. *Gee, supra*. If the plaintiff had paid the amount into court, and the plaintiff had taken it out of court in satisfaction of the claim, then that is the end of the matter. He gets no interest because there is no judgment. If a defendant wishes to avoid the payment of interest he should in future make his payment into court an amount which he says is sufficient to satisfy the cause of action apart from interest.

In the result I am not persuaded to take a contrary view that interest ought to be awarded from the date of judgment.

For these reasons I am of the opinion that the appeal should be dismissed with costs, and judgment that the defendant is wholly to blame upheld.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; R.K. Nathan & Co.*

LETCHUMANAN CHETTIAR v. PALANIAPPA CHETTIAR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) August 19 and September 24, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 47 of 1977]

Hindu Law — Joint Hindu Family — Deceased member of joint Hindu Family — Will made by deceased — Application of Mitakshara law — Action for partition brought by applicant — Applicant separated from joint Hindu Family — Whether testator can dispose share in undivided assets of Joint Hindu Family — Probate and Administration Act, 1959, ss. 22, 24 — Distribution Ordinance, 1958.

Probate and Administration — Will — Application for probate — Whether court concerned with validity of bequests — Hindu law — Joint Hindu Family — Probate and Administration Act, 1959, ss. 22 and 24.

This was an appeal from the decision of Ajaib Singh J. ([1977] 2 M.L.J. 258). The deceased died testate leaving all his "estate and effects of whatsoever nature and wheresoever situate in India, Burma, Malaysia, Singapore or elsewhere including movable and immovable assets found belonging to (him) personally as (his) separate property together with all the endowments therefrom when accounts are taken in respect of PL.AR. Firm at Pork Dickson in connection with the judgment and order in the matter of Civil Suit No. 34 of 1951 in the High Court at Seremban plus (his) one-third share of all the movable and immovable assets in the joint Hindu family firm of PL.AR. at Port Dickson." The appellant, a son of the deceased, claimed to be the executor appointed under the will and applied for probate. The respondent, his step-brother, entered a caveat and claimed to be a coparcener in the joint Hindu family. Earlier the respondent had filed a suit for partition of the joint family property. Nevertheless the respondent claimed to have a share in the joint Hindu family firm of PL.AR. The learned trial judge stated that the only issue left to be determined was whether the deceased could lawfully dispose of by will his one-third share in the joint Hindu family firm of PL.AR. in Port Dickson. He

held that the testator's one-third share in the joint Hindu family should be excluded from probate and that this one-third share should form part of the deceased's estate on intestacy. The appellant appealed.

Held, allowing the appeal: (1) on obtaining an order for partition of the joint Hindu family property the respondent ceased to be a member of the coparcenary in relation to what was left of the property after such partition. The only coparceners left thereafter were the father and the appellant. On the death of the father that property must go to the appellant by survivorship, he being the sole surviving coparcener;

(2) the Probate Court is only concerned with the question of genuiness of the will, its due execution and attestation and testamentary capacity of the testator. It is not part of the jurisdiction of the Probate Court to pronounce on the validity of the bequest;

(3) the appeal must therefore be allowed and a grant of probate of the deceased's will be issued to the appellant subject to a proviso that before disposing or distributing any property bequeathed under the will or the proceeds of such property there shall be an order of court to that effect.

Cases referred to:-

(1) *PL. A.R. Arunasalam Chettiar & Ors.* v. *AR. PL. Palaniappa Chettiar* [1974] 2 M.L.J. 133.

(2) *Raghavamma & Anor.* v. *Chenchamma & Anor.* A.I.R. 1964 S.C. 136, 147.

(3) *Syed Kasam* v. *Jorawar Singh A.I.R.* 1922 P.C. 353, 355.

(4) *M.D.R. Ranganatha* v. *M.D.T. Kumaraswami* A.I.R. 1959 Mad. 253, 256.

(5) *Soundara Achi* v. *Kalvani Achi & Ors.* [1953] M.L.J. 147.

(6) *Barot Parshotam Kalu* v. *Ba'i Muli* I.L.R. (1894) 18 Bom. 749.

(7) *Birj Nath De & Anor.* v. *Chander Mohan Banerji* I.L.R. (1897) 19 All 458.

(8) *Raghu Nath Misser* v. *Pate Koer* (1901-1902) 6 C.W.N. 345.

(9) *Isubu Lebbe Maricar Hadjiar* v. *Idross Lebbe Marikar Hadjiar Abdul Hamid* (1923) 33 Mad. L. T. 437, 438.

(10) *Ishwardeo Narain Singh* v. *Kamta Devi* A.I.R. 1954 S.C. 280, 281.

(11) *In re Skeats, Thain* v. *Gibbs* [1936] 1 Ch. 683.

(12) *Chua Chee Chor* v. *Chua Kim Yong & Ors.* [1960] M.L.J. 127.

(13) *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* I.L.R. (1893) 20 Cal. 888.

(14) *Behari Lall Sandyal* v. *Juggo Mohun Gossain* I.L.R. (1878) 4 Cal. 1, 5.

FEDERAL COURT.

Atma Singh Gill for the appellant.

A.D. Rajah for the respondent.

Gill C.J. (Malaya): PL. AR. L. Letchumanan Chettiar @ AR. Lakshmanan Chettiar, the appellant in this case and plaintiff in the probate suit from which this appeal has arisen, and AR. PL. Palaniappa Chettiar, the respondent to this appeal and defendant in the suit, are half-brothers. Together with their father PL. AR. Arunasalam Chettiar and his second wife named Meenakshi Achi @ Meenachi Achi, the mother of the appellant who is the younger of the two half-brothers, they were members of a joint Hindu family, the father being the karta, or manager, on behalf of the family. The family had property both in India and in Malaya.

On July 15, 1950 the respondent filed a suit against the other members of the family in the court of the Subordinate Judge of Devakottai, India. Claiming that the assets of PL. AR., *inter alia*, were assets of the Hindu joint family, he sought partition of the Hindu joint family property. While the suit was still pending in India, on April 2, 1951 he started similar proceedings in the High Court in Malaya at Seremban in relation to what he alleged to be joint Hindu family property in Malaya, namely, the assets of the money-lending concern at Port Dickson known as "The PL. AR. Firm" which became possessed also of landed property.

On April 1, 1952 the Subordinate Court of Devakottai, even though recognising that it had no jurisdiction as to the immovable assets in Malaya, held that PL. AR. and its assets belonged exclusively to the father as his own property. The respondent appealed to the High Court of Madras. Before this appeal was heard, on September 3, 1954 the High Court at Seremban made a consent order staying the proceedings in Malaya pending final determination of the Indian proceedings, the defendants agreeing to abide by such determination. The Madras High Court substantially determined the ownership of PL. AR. against the respondent, but its judgment was reversed by the Supreme Court of India on October 25, 1963. The Indian Supreme Court declared that PL. AR. and its assets belonged to the Hindu joint family, the instant respondent being entitled to one third share.

In consequence of the judgment and order of the Supreme Court of India, on July 11, 1964 the High Court at Seremban ordered an account to be taken of all movable and immovable property of the Hindu joint family and the amount due to the respondent. An appeal from that order to the Federal Court was dismissed, but neither the order of the High Court nor that of the Federal Court specified the date from which the accounting should start. The matter was subsequently raised in an application for consequential orders and directions. On March 21, 1968 the High Court directed accounts to be taken from the date of commencement of the PL. AR. Firm as found by the Indian Supreme Court, namely, August 22, 1926. An appeal against all such directions to the Federal Court was dismissed, whereupon a further appeal went to the Privy Council. The Privy Council in allowing the appeal held that "there was nothing in this case to displace the general rule of Mitakshara law that an account must be taken from the first unequivocal declaration by a member of the family of his desire to enforce a partition and as in this case the first unequivocal demand for partition was constituted by the commencement of the respondent's suit on July 15, 1950, that was the date at which the appellant should account for the assets of the firm." (See *PL. AR. Arunasalam Chettiar & Ors.* v. *AR. PL. Palaniappa Chettiar*[1]).

The brief history of the litigation between the members of this Hindu joint family, which I have stated above, serves as a background to the probate suit between the parties to this appeal following the death on August 19, 1972 of their father PL. AR. Arunasalam Chettiar (hereinafter referred to as the "deceased") after he had made and duly executed his will and testament dated March 19, 1966. By

his will the deceased appointed his second wife Meenachi Achi as the sole executrix of his will. The will further provided that in the event of the sole executrix not surviving the deceased or renouncing the executorship, the appellant shall be the executor and trustee of the will. The executrix under the will survived the deceased but she renounced all claim to the executorship to allow the appellant to become the sole executor.

It was in his capacity as the lawful son and executor named in the will of the deceased that the appellant filed a petition in the High Court at Seremban for the grant of probate of the will. Upon the respondent lodging a caveat against the grant of such probate the appellant commenced a probate suit by issuing a writ. The plaintiff's case briefly was that although the respondent was a lawful son of the deceased and one of the persons entitled to share in the deceased's estate in the event of intestacy in accordance with the Mitakshara law which governs the joint Hindu family of the deceased, he was not entitled to any share in the deceased's estate on the ground that he had become a separated member from the joint family.

In his defence filed in the proceedings the defendant stated that he was the lawful elder son of the deceased and as such, one of the persons entitled under Hindu law to share in the estate of the deceased in the event of intestacy. He alleged that the will of the deceased was invalid under Hindu law as the deceased had no right or justification to disinherit him. He said that in Seremban High Court Civil Suit No. 4 of 1951 it was ordered that he was entitled to one-third share of the property of PL. AR. Firm and one-third share of the firm's income from the year of the firm's inception in 1924. He went on to say that as the accounts ordered by court had not yet been taken and his share in the property and income had not been paid to him, the deceased was not entitled to deal with the property of the firm, so that his will was invalid. He further averred that the deceased as a member of a joint Hindu family could not bequeath any property till the partition of the joint family property was effected and the assets distributed.

In his oral testimony at the trial of the suit the appellant as plaintiff stated that his mother was the first executor of the will but on her renouncing her right to the executorship he himself became the sole executor. He said that the defendant, his step-brother, was claiming to be a coparcener in the joint Hindu family property, although on July 15, 1950 he had filed a suit for a partition of the family property and by doing so had become a separated member from the joint Hindu family. He stated further that after the partition he and his father remained in the joint family and that the defendant having become a separated member from the family had no share in the deceased's estate.

No evidence was called on behalf of the defendant. Mr. Marjoribanks, who appeared for him, conceded that he could not oppose the order for probate to be granted to the plaintiff but submitted that a part of the property bequeathed by the deceased in his will must go on an intestacy because that part was the joint family property and could not be willed by the deceased. What the deceased said in his will in effect was that he gave all his separate property plus his one-third share of all movable and immovable assets in the joint Hindu family firm of PL. AR. Firm at Port Dickson to the plaintiff.

Mr. Marjoribanks submitted that the one-third share of all the movable and immovable assets in the joint family firm of PL. AR. at Port Dickson could not be bequeathed by the deceased because that share was part of the joint Hindu family property and was not the separate personal property of the deceased. In support of this contention he referred to the case of *Raghavamma & Anor.* v. *Chenchamma & Anor.*[2] wherein it was held that a member of an undivided coparcenary has the legal capacity to execute a will but that he cannot validly bequeath his undivided interest in the joint family property.

Mr. Atma Singh Gill submitted that the deceased had the capacity to make a will and therefore had made a valid bequest of all his property whether it belonged to him personally or was in the joint Hindu family. He further said that the defendant, having become a separated member from the joint family, had no further right to the deceased's property.

The view which the learned trial judge took was that the only issue in the case which was eventually left to be determined by the court was whether the deceased could lawfully dispose of by will his one-third share in the joint Hindu family firm of PL. AR. in Port Dickson. In relation to this issue, this is what the learned judge has stated in his grounds of judgment:

"The personal and customary Hindu law extends to Hindus domiciled in Malaysia and the parties in this case before me are governed by the Mitakshara law. Under both the Mitakshara and the Dayabhaga schools of law a Hindu can dispose of by will his own separate or self-acquired property and according to the Dayabhaga law he may dispose of by will not only his own personal property but also his interest in the undivided joint family property. But the position is different according to the Mitakshara law. Under the Mitakshara law if after making his will and before his death a testator becomes a separate member from the joint Hindu family any bequest that he might have made in his will with regard to his own share in the undivided property would be held good but not if he dies as a member of the joint Hindu family. In the latter event his interest in the joint property goes to his family and his purported attempt to give away that interest in his will can have no effect. In short a coparcener cannot according to Mitakshara law dispose of by will his undivided coparcenary interest except where he is the sole coparcener in which case he may bequeath the joint family property as if it was his own separate property. (See generally the chapter on Wills in *Mulla's* Hindu Law, 14th Edition)."

He then refers to a short passage from the judgment of Subbarao J. in the case of *Raghavamma* v. *Chenchamma.*[2]

His Lordship next considered the legislative changes which have been made in India as regards the Hindu law of succession. In the light of such changes the conclusion at which he arrived is stated in his grounds of judgment as follows:

"Section 30 of the Hindu Succession Act 1956 of India now allows Hindus governed by the Mitakshara Law to dispose

of by will their undivided interests in their coparcenary properties. The preamble to this enactment states that it is an Act to amend and codify the law relating to intestate succession among Hindus and it extends to the whole of India except the State of Jammu and Kashmir. The legislation of any country can have no extra-territorial jurisdiction and the Indian Act of 1956 cannot apply to Hindus domiciled in Malaysia who must continue to be governed by their original personal and customary laws unaffected by any legislative changes to those laws which may be made from time to time by the country of their origin. Our own legislature alone can make a change in their personal and customary laws. It is on this footing therefore that the present case has to be decided. At the time of making his will and at his death the deceased was not separated from his joint Hindu family nor was he a sole surviving coparcener. He could not therefore according to the Mitakshara law bequeath his one-third share in the undivided assets of the joint Hindu family firm of PL.A.R. in Port Dickson. In the circumstances therefore I order that probate of the will be granted to the plaintiff except that the testator's one-third share in the joint Hindu family of PL.A.R. in Port Dickson be excluded and I further order that this one-third share shall form part of the deceased's estate as on intestacy. In all the circumstances of this case I order that each party bears its own costs."

The appeal to this court has been brought against that part of the learned judge's decision which decides that the testator's one-third share in the joint Hindu family firm of PL. AR. in Port Dickson be excluded from probate and that this one-third share should form part of the deceased's estate on an intestacy.

The appeal before us was also argued by Mr. Atma Singh Gill. His main ground of appeal is that the learned judge after coming to the correct decision as regards the only issue to be determined by the court in this case erred in law and on facts when he ruled that at the time of making his will and at his death the deceased was neither separated from his joint family nor was he a sole surviving coparcener and that he could not therefore according to the Mitakshara law bequeath his one-third share in the undivided assets of the joint Hindu family firm in Port Dickson.

There are ten reasons set out in the memorandum of appeal in support of this ground but I do not consider it necessary to go into them in detail. It is common ground that the assets of PL. AR. Firm in Port Dickson belonged to the joint Hindu family of which the respondent was a member until July 15, 1950 when he became separated from it on his commencing an action for partition of his share of the property. It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect severance in interest even before decree. (*Per* Viscount Cave in the Privy Council in *Syed Kasam* v. *Jorawar Singh*).[3]

The question to be decided in this case is not whether the respondent had become separated from the Hindu joint family but whether the testator had become so separated. The passage from the judgment of Subbarao J. in the Supreme Court in the case of *Raghavammah* v. *Chenchamma*[2] relied on by the learned trial judge in this case reads as follows:

> "A member of an undivided corparcenary has the legal capacity to execute a will; but he cannot validly bequeath his undivided interest in the joint family property. If he died an undivided member of the family, his interest survives to the other members of the family, and, therefore, the will cannot operate on the interest of the joint family property. But if he was separated from the family before his death, the bequest would take effect. So, the important question that arises is whether the testator in the present case became separated from the joint family before his death."

The same question arises in this case and the answer to the question, as stated by the learned judge, is that the deceased had not become separated from what was left of the family after the respondent had separated from it. This is clear from the evidence of the appellant himself in the court below that after the partition he and his father remained in the joint family.

A joint Hindu family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters bound together by the fundamental principle of sapindaship or family relationship which is the essence and distinguishing feature of the institution. This body is purely a creature of law and cannot be created by act of parties, save in so far that by adoption or marriage a stranger may be affiliated as a member thereof. (See Raghavachariar on Hindu Law, 6th Edn. page 262, para. 233).

Only those members of a joint Hindu family who can inherit property are called coparceners. Coparcenary is a narrower body than a joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus, while a son, a grandson, or a great-grandson is a coparcener with the holder of the property, the great-great-grandson cannot be a coparcener with him, because he is removed by more than three degrees from the holder. (See Raghavachariar on Hindu Law 6th Edn. page 264 para. 234).

I would pause here to observe that in so far as the joint Hindu family in this case is concerned the deceased was the holder of the property. The bulk of the property consists of lands which stand registered in the name of the deceased.

As regards incidents of coparcenary right, there is a community of interest and unity of possession between all members of a coparcenary and upon the death of any one of them the others take by survivorship that in which, during the deceased's lifetime, they had a common interest and common possession. No individual member while the family remains undivided can predicate of the joint and undivided property than he, that particular member, has a certain definite share, either in the corpus or in the income. Till a partition takes place his interest remains a fluctuating interest enlarged by deaths and diminished by births in the family. In every coparcenary, the son, grandson or great-grandson obtains an interest by birth in the coparcenary property so as to be able to control and restrain improper dealings with the

property by another coparcener. He is entitled to reside and be maintained in the family house along with his wife and children and to have joint possession and enjoyment of coparcenary property. He enjoys certain powers of alienation and can enforce a partition of his share in the common property. This coparcenership relation is a creature of law and cannot be created by act of parties except that a member may be introduced into the coparcenary by adoption. (See Raghavachariar on Hindu Law 6th Edn. page 266 para. 236).

The system of joint family with its incident of succession by survivorship is a peculiarity of the Hindu law. In such a family no member has any definite share and his death or somehow ceasing to be a member of the family causes no change in the joint status of the family. Where a coparcener dies without male issue his interest in the joint family property passes to the other coparceners by survivorship and not by succession to his own heirs. (See Raghavachariar on Hindu Law 6th Edn. page 294 para. 266).

Having stated the legal position of the members of a joint Hindu family, I come to the only other substantial ground of appeal, which is that the learned judge ought to have held that having once exercised his right of partition and having obtained a judgment with his interest quantified at one-third share in the said coparcenary of PL. AR. in Port Dickson, the respondent had lost his right of survivorship to what the father had obtained therein and that the testator was at liberty to bequeath the same by his will as he had done. With the first limb of the ground of appeal I entirely agree. I find support for it from the following passage in the judgment of Panchapakesa Ayyar J. in *M.D.R. Ranganatha* v. *M.D.T. Kumaraswami*[4]:

"We do not see why the right by birth should be allowed to operate more than once. In our opinion, it exhausts itself by a complete partition of the ancestral and joint family properties.

It cannot again be asserted for setting up joint tenancy and survivorship in the father's share of the ancestral properties got at partition, when obviously no such joint tenancy and survivorship will attach to the shares got at partition by the brothers *inter se*. In our opinion, the apartibandha succession is put an end to at partition, and the sapratibadha succession takes its place even regarding the joint family properties got by the father at partition."

It seems clear from what I have stated above that on obtaining an order for partition of the joint Hindu family property the respondent ceased to be a member of the coparcenary in relation to what was left of the property after such partition. The only coparceners left thereafter were the father and the appellant. On the death of the father that property must go to the appellant by survivorship, he being the sole surviving coparcener.

That brings me to the second limb of the ground of appeal to which I have referred above, namely, that the testator was at liberty to bequeath the same by will as he had done. As I have stated above, the testator had not separated from the appellant prior to his death. It will therefore be correct to say that what he held jointly with the appellant must go to the appellant by survivorship and not by virtue of the will. That, however, is not a question to be decided in these proceedings. It is a question on which the appellant will have to seek directions of the court in some subsequent proceedings as regards the distribution of the assets of the PL. AR. Firm, or perhaps, which is more likely, it is a question which will fall to be decided in such proceedings as the respondent may choose to bring to claim his right, if any, to any part of such property.

To recapitulate what I have stated above, the assets of PL. AR. Firm in Port Dickson belong to a joint Hindu family. Until July 15, 1950, the coparceners of this joint Hindu family property were the appellant, the respondent and their father. As from that date the respondent by commencing a suit for partition brought about a severance of his share from the joint family property. Thereafter the appellant and his father remained as the only two coparceners of the property. On the father's death on August 19, 1972 the appellant became the sole surviving coparcener.

In making the order that probate of the deceased's will be granted to the plaintiff except that the testator's one-third share in the joint Hindu family property of PL. AR. in Port Dickson be excluded, the learned judge proceeded on the supposition that the deceased died possessed of that share in the family property. With respect, he was wrong in proceeding on that supposition. If the deceased had in fact separated from the family before his death, then his bequest under the will would take effect, but the truth is that he died an undivided member of what remained of the joint family after the respondent had separated from it. This indeed was the finding which the learned judge himself made when he said in his grounds of judgment that at the time of making his will and at his death the deceased was not separated from the joint Hindu family, nor was he a sole coparcener. In any event, as I have already said, the question as to what part of the deceased's estate should be dealt with as on intestacy is not a question to be decided in these proceedings.

Whether the Distribution Ordinance, 1958 applies to the deceased's estate is open to question because section 6 of the Ordinance speaks of any person who "shall die intestate as to any property to which he is beneficially entitled for an interest which does not cease on his death." If what I have stated about the Mitakshara law being applicable to the joint family property in this case is correct, then it would seem clear that whatever beneficial interest the deceased had in the property ceased on his death and passed by the law of survivorship to the appellant. This, however, again is a question which does not fall to be decided in these proceedings.

Counsel for the respondent referred us to section 92(2)(d) of the National Land Code which provides that the rights exercisable by any person or body to whom State land has been alienated under final title shall include "the right (subject as aforesaid, and subject also to the provisions of his personal law and of any other law for the time being in force relating to the disposition or devolution of property on death)

to dispose of the land, or any undivided share therein, by will." He submitted that the testator did not have the capacity to bequeath any part of what remained of the joint family property, so that the respondent would be entitled to a share on intestacy in the immovable property of the deceased by virtue of section 4(2) of the Distribution Ordinance 1958. In this connection he cited to us the case of *Soundara Achi* v. *Kalvani Achi & Ors.*[5] In my judgment that case has very little relevance to the facts of this case, as it was concerned with the property of a deceased sole coparcener. As regards the rest of the submission by respondent's counsel, the answer again is that these submissions will have to be made in some subsequent proceedings.

As I have stated above, the learned judge dealt with the case on the basis that the issue to be decided was whether the deceased could lawfully dispose of by will his one-third share in the joint Hindu family property. With respect, that is not an issue which can be determined when dealing with a suit for probate of a will, as it would seem clear from the authorities that a court cannot go into the question of title to property in such a suit.

In *Barot Parshotam Kalu* v. *Ba'i Muli*[6] it was held that a court is not justified in refusing to grant probate of a will because the testator had no power to dispose of some or even all of the property he purported to deal with. In *Birj Nath De & Anor.* v. *Chander Mohan Banerji*[7] it was held that it is not the duty of a court entertaining an application for grant of probate to consider any issue as to the title of the testator to the property with which the will propounded purports to deal, or as to what disposing power the testator may have possessed over such property. In *Raghu Nath Misser* v. *Pate Koer*[8] it was held that a Hindu widow governed by the Mitakshara law is entitled to obtain letters of administration of her husband's estate on the mere allegation that he left separate property, and that the court cannot go into the question whether the property left was joint or separate.

In the Ceylon case of *Isubu Lebbe Marikar Hadjiar* v. *Idross Lebbe Marikar Hadjiar Abdul Hamid*[9] Viscount Haldane said in the Privy Council:

"It may or may not be — it does not come before their Lordships for decision — that the testatrix had no power to dispose of her whole estate, as against only a part, which according to Mohamedan law in general, is what is within the disposing power of the testatrix. If there is anything in it, on which their Lordships express no opinion, it is a question which must be determined at some subsequent stage."

In *Ishwardeo Narain Singh* v. *Kamta Devi*[10] S.R. Das J. delivering the judgment of the Supreme Court of India said:

"The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. It is surprising how this elementary principle of law was overlooked by both the courts below."

In *re Skeats, Thain* v. *Gibbs*[11] a will made on a printed form contained an appointment of the testator's wife as executrix and a direction to pay debts and funeral and testamentary expenses, but no gift or disposition of property to any person. The will was admitted to probate, but it was held that the executrix took the testator's estate as trustee for the persons entitled to the property of an intestate, including herself, as set out in section 46 of the Administration of Estates Act, 1925.

In our case of *Chua Chee Chor* v. *Chua Kim Yong & Ors.*[12] the Court of Appeal held that when the court grants Letters of Administration it does not go into questions of title as to the assets alleged to be the property of the deceased at the time of his death. Thomson C.J. (as he then was) said at page 128:

"In the present case it was not open to the defendant to do anything in relation to the petition that would in any way raise the issue of what in fact constituted the assets of the Estate. That question could only be litigated in subsequent proceedings to which the obtaining of administration was a necessary preliminary and that is just what has been done in the present proceedings."

Smith J. in the same case, at page 130, cited with approval the passage from the judgment in the case of *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*,[13] in which the court held, at page 894, that "in a proceeding upon an application for probate of a will, the only question which the court is called upon to determine is whether the will is true or not, and that it is not the province of the court to determine any question of title with reference to the property covered by the will." His Lordship also cited with approval the passage from the judgment in *Behari Lall Sandyal* v. *Juggo Mohun Gossain*,[14] at page 5, that "upon an application for probate of a will, as long as it is made *bona fide*, it is not the province of the court to go into questions of title with reference to the property of which the will purports to dispose."

From the long list of authorities which I have cited above it is abundantly clear that the Probate Court is concerned only with the question of genuiness of the will, its due execution and attestation and testamentary capacity of the testator. It is not part of the jurisdiction of the Probate Court to pronounce on the validity of the bequest. It is also equally clear that the obtaining of a grant of probate or letters of administration is a necessary preliminary step to be taken in any question to be litigated in subsequent proceedings as regards the disposition of property under the will.

In Malaya unlike India the title held in the name of the karta cannot pass to the next karta or to anybody except through a personal representative. *J. Gareth Miller* on the Machinery of Succession 1977 says at page 71:

"The persons entitled to the property vested in a deceased person at the date of his death are determined by his will or by the rules of intestate succession. However, in English law such property does not vest automatically in the beneficiaries so determined. It must first pass through the hands of the deceased's personal representative who, subject to the supervision of the court, will be responsible for the administration of the deceased's estate."

The position in this country in my judgment is the same, especially in the case of immovable property which must first be vested in the deceased's personal representative whether he be the executor or the admi-

nistrator. The grant of probate to the executor does not confer upon him any title to property which the testator had no right to dispose of. It only perfects the representative title of the executor to the property, which did belong to the testator, and over which he had a disposing power. It does not prejudice the rights of any person who claims any such property. Indeed, no person can make any title or attempt to enforce his right to any of the testator's property unless probate of the will has first been obtained.

The position in India would appear to be that no probate or letters of administration can be granted in respect of joint family property. But where such property stands in the name of the manager or other members of the family, letters of administration may be granted to the surviving coparcener or his heir to the legal estate in that property. This constantly happens in the case of shares in a limited company (see *Mulla* on Hindu Law 14th Edn. page 451). As I have stated above, in the present case the whole of the immovable property belonging to the joint Hindu family stands registered in the name of the deceased. It is therefore necessary for that property to be vested in the executor appointed by the deceased by his will before it can be distributed to the persons rightly entitled to it. To enable any person claiming any part of such property it will be necessary to restrict the powers of the executor to deal with it without an order of court.

Section 22 of the Probate and Administration Act, 1959 provides that "where a person dies, leaving property in which he had no beneficial interest on his own account, and does not leave a representative who is able and willing to act, letters of administration, limited to that property, may be granted to the person beneficially interested in the property, or to some other person on his behalf." Section 24 of the same Act provides that "a grant of probate or letters of administration may be made subject to such exception as the will or the circumstances of the case require; and in any such case a further grant may be made of the part of the estate so excepted." From the provisions of these two sections it is clear that the appellant has a better right to be appointed as the deceased's personal representative. There is no doubt about the deceased's will being a perfectly valid will. A grant of probate in respect of that will must therefore be granted to the appellant but subject to the proviso that he shall have no power to dispose of or distribute any property bequeathed by the will or its proceeds without a further order of court to that effect.

In all the circumstances of the case and for the reasons which I have stated, I would allow the appeal, setting aside the order made by the court below and substituting in its place an order that a grant of probate of the deceased's will be issued to the appellant subject to the proviso that before disposing of or distributing any property bequeathed under the will or the proceeds of such property there shall be an order of court to that effect. The respondent must pay the costs of this appeal and the costs in the court below.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal allowed.

Solicitors: *Gill & Tang; Lovelace & Hastings.*

TAY SENG KENG v. TAY EK SENG CO. SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) August 17 and September 27, 1977]

[Kuala Lumpur — F.C. Civil Appeal No. 4 of 1977]

Practice and Procedure — Contempt — Failure to comply with interim order — Evidence given on affidavits — Proof beyond reasonable doubt.

The appellant who was a manager employed by the respondent company had his services terminated. The respondents brought an action claiming an order to restrain the appellant from remaining in the estate bungalow and requiring him to hand possession of the said bungalow and all furniture, fittings, files and documents. An interim order was obtained by the respondents. Subsequently the bailiff handed over possession of the bungalow and furniture to the respondents' representative. The respondents alleged that the appellant had a number of books and documents and that he had failed to hand them over. A writ for attachment for contempt was applied for and the High Court issued a warrant for committal. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the evidence in this case consisted of affidavits from both sides and on a mere consideration of such affidavits it was quite impossible to say that the guilt of the appellant had been proved beyond reasonable doubt;

(2) in all the circumstances the appellant's imprisonment for contempt of court could not be sustained.

Case referred to:-

(1) *In re Bramblevale* [1970] 1 Ch. 128.

FEDERAL COURT.

C. Paramjothy (*Anthony Taye* with him) for the appellant.

R.R. Chelvarajah for the respondents.

Gill C.J. (Malaya) (delivering the judgment of the Court): The appellant was the manager of the respondent company's Chuan Moh San Rubber Estate as well as of their Malacca Head Office. His services as such manager were terminated on June 10, 1974 and June 14, 1974 respectively.

On August 30, 1974 the respondents brought an action in the High Court in Malacca claiming against the appellant, *inter alia*, an order to restrain him from remaining in the estate bungalow and the manager's room and a mandatory order requiring him to hand over possession of the said bungalow and the manager's room together with all furniture and fittings, files and documents including all books of account and keys to safe, drawers, lockers and cupboards etc. On October 4, 1974 they obtained an interim order in the same terms as the substantial orders they were seeking in the action.

The appellant failed to comply with the orders whereupon the bailiff took steps to hand over to the respondent's representative possession of the bungalow and the manager's room and such items of furniture